No. 10-363

Supreme Court, U.S.
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In the
Supreme Court of the United States

ESTATE OF LOUISE BLYTH TIMKEN (Deceased), *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Respondent United States of America claims that the court of appeals decision under review here does not conflict with any decision of another court of appeals. This claim is wrong. The circuit conflict that exists here was explicitly admitted and discussed by both the court of appeals in this case and in the preceding court of appeals' decision by the same circuit upon which the panel in this case felt itself bound. Given the undeniable circuit conflict on an important issue of federal taxation requiring uniformity, this case cries out for review by the U.S. Supreme Court.

Incredibly, Respondent claims that a circuit conflict does not exist when the Sixth Circuit Court of Appeals has explicitly admitted in both the opinion below and in the prior panel opinion upon which it largely relied, that, indeed, a circuit conflict does exist. To put it another way, Respondent is denying the undeniable.

In its discussion of the issues in this case, the Sixth Circuit recognized that two circuit courts of appeal (the Eighth and the Ninth) had previously ruled in favor of the taxpayer finding that the grandfathering exemption is an unambiguous statute which precludes the generation skipping transfer (GST) tax from applying to transfers resulting from the post-GST exercise of a general power of appointment granted in a pre-GST tax irrevocable trust. Petition Appendix, p.10a. Like the predecessor Sixth Circuit panel had done in *Estate of Eleanor R. Gerson v. Commissioner,* 507 F.3d 431 (6th Cir. 2007) (*Gerson*), the panel in this

case noted that the Treasury Department was developing regulations at the time that the Eighth and Ninth Circuit decisions were made and that, in any event, "we are surely not bound by the Eighth and Ninth Circuits." *Id.* at p.436. The panel in this case determined it was bound by the prior holding of the Sixth Circuit in *Gerson* which reached a conclusion admittedly different from the one reached by the Eighth and the Ninth Circuits in *Simpson* and *Bachler*. Thus, this is a quintessential conflict in the circuits that was indisputedly admitted and discussed in both of the relevant Sixth Circuit opinions. It is outrageous for Respondent to now argue that there is no circuit conflict when the Sixth Circuit itself admits that there is a circuit conflict in the very decision under review here.

The circuit conflict admitted to exist by the Sixth Circuit was explicitly identified and discussed in *Gerson*. As the Sixth Circuit succinctly put it:

> The parties dispute on this second clause brings to this court a question that divides three of our sister circuits and the Tax Court below. Compare *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002), and *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999) (grandfathering transfer), with *E. Norman Peterson Marital Trust v. Comm'r*, 78 F.3d 795 (2d Cir. 1996) (finding grandfather clause inapplicable). See also *Gerson*, 127 T.C. at 152.

The Sixth Circuit then proceeded to engage in a lengthy discussion about the conflict and ultimately deciding to disagree with the approach and conclusion taken by the Eighth and the Ninth Circuits in *Simpson* and *Bachler* respectively. They explained why they decided the *Gerson* case differently than the Eighth and the Ninth Circuits decided the same issue. As the Sixth Circuit was empowered to do, it chose to take a different path and decided the issue against the taxpayer in the absence of controlling authority elsewhere. In the end, the Sixth Circuit said: "...we are surely not bound by the Eighth and Ninth Circuits". *Gerson* at fn.2.

Thus, the conflict between the circuits on the issue of whether the grandfather clause is ambiguous or not could not be more clearly identified and framed. Respondent's attempt to suggest that no conflict in the circuits exists is simply wrong as set forth above.

That then brings us to the salient point to be derived from the Petition. That point is that there is a circuit conflict and that there is no uniformity of taxation with respect to the generation-skipping transfer tax as a result of that conflict of circuits. Surely, uniformity of taxation for a national tax like the GST tax is a worthy purpose for accepting this case for a hearing on the merits. There is no doubt that if the shoe was on the other foot and the IRS had lost the case below the Court would be hearing a steady drumbeat from the Respondent about the importance of national uniformity of taxation to support the taking the case. The fact that it is the taxpayer who is seeking that relief here should not

make a difference in whether a case clearly violating uniformity of a national tax is worthy of the Court's review.

The other item from Respondent's Brief in Opposition worthy of comment is the claim that the Eighth and Ninth Circuits would have ruled in favor of the IRS had the Treasury Regulation in issue in this case been in existence at the time those courts made their ruling. Once again, Respondent is wrong. The fact is that the constructive additions Treasury Regulation in issue in this case *was* in existence at the time *Simpson* and *Bachler* were decided. *Simpson* cited the regulation at p.815; *Bachler* cited the constructive additions regulation at p.1080. Furthermore, the constructive additions regulation by its own terms covered not only the lapse, but also the exercise of a general power of attorney and, therefore, was arguably directly applicable to the situation faced by those two courts. Nevertheless, both the Eighth and Ninth Circuits ruled in favor of the taxpayer and did not deny the taxpayers there the protection of the grandfather clause. Thus, this Court should draw the exact opposite conclusion as what is being suggested by Respondent in this case: The Eighth and Ninth Circuits would likely rule in favor of the taxpayers here.

Furthermore, the constructive additions Treasury Regulation upon which the Respondent relies in this case cannot be reconciled to the decisions of the Eighth and Ninth Circuits in *Simpson* and *Bachler* because the regulation mentions both exercises and lapses of a general power of attorney. According to the Eighth and

Ninth Circuits, though, exercises are protected. The Respondent is not free to promulgate a Treasury Regulation which overrules the decision of a Circuit Court of Appeals. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). Clearly, the Eighth and Ninth Circuits did not and would not have reached the same conclusion as was reached by the Sixth Circuit in this case and it is preposterous to suggest otherwise.

Finally, it is important to note that what allowed the assets to skip a generation in this case was the specific provisions of the irrevocable trust instrument put into effect by Mr. Timken which provided for and actually specified that the next generation be skipped under the circumstances presented by this case. That is exactly the kind of reliance that a grandfathering clause is intended to protect from the imposition of a tax which did not exist in any form at the time that the estate plan in issue was irrevocably established. As the Eighth Circuit said in *Simpson*, *supra* at p.816:

> The words make it clear that Congress intended to protect the reliance of *creators* of trusts on the law as it existed at the time the trusts became irrevocable. (Emphasis added).

Respondent does not dispute that the estate planning employed by Mr. Timken in this case was standard estate planning involving the use of a marital deduction trust which required the use of a general power of appointment in order to be effective. It is absurd to suggest that Congress did

not intend to protect irrevocable conventional estate planning like Mr. Timken's when the grandfathering clause was enacted.

CONCLUSION

For all the foregoing reasons as well as for the reasons set forth in the Petition, the Petition for Writ of Certiorari should be granted.

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